In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-540

LOUIS CRAMER and MINNIE K. CRAMER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of New York, petitioners, husband and wife, were convicted on all counts of a four-count indictment, charging them with having willfully attempted to evade and defeat their individual income tax for the years 1962 and 1963, in violation of 26 U.S.C. 7201, and with having willfully assisted in the preparation of materially false partnership returns relating to income for Cramer's Auto Parts Co., in violation of 26 U.S.C. 7206(2). Louis Cramer was sentenced to a total of

six months' imprisonment and five years' probation and was fined a total of $10,000; Minnie Cramer received suspended sentences on all four counts with five years' probation and was fined a total of $10,000 (Pet. App. 21a-22a). A divided court of appeals affirmed (Pet. App. A).

The essential facts are summarized in the majority opinion below (Pet. App. A, pp. 2a-5a) and we will not repeat them here. Essentially, the evidence at trial showed (A. 325a, 327a, 333a, 334a)[1] that petitioners had understated their taxable income by $74,839.61 on their joint income tax return for 1962 (Count 1) and by $55,466.70 on their joint income tax return for 1963 (Count 2). In addition, they had overstated the merchandise purchases by the partnership by $47,000 for 1962 and by $30,000 for 1963 (Counts 3 and 4) (A. 324a-326a).

1. Petitioners contend here, as they did below, that their conviction should be set aside because the grand jury testimony of Special Agent Sager, apparently the only witness to appear before the grand jury, was not recorded, and hence was unavailable to the defense for purposes of cross-examination at trial. It is, of course, recognized that "a defendant is entitled as a matter of right to examine the transcribed grand jury testimony of witnesses who testify at trial, insofar as it relates to their trial testimony * * *" (Pet. App. A, p. 7a). See *United States* v. *Youngblood*, 379 F. 2d 365 (C.A. 2). This, however, does not entitle a person convicted of a crime to a

[1] "A." references are to the appendix in the court of appeals.

reversal of that conviction on the ground that the grand jury testimony was not recorded. See *United States* v. *Ayers*, 426 F. 2d 524 (C.A. 2), certiorari denied, 400 U.S. 842; *Nipp* v. *United States*, 422 F. 2d 509 (C.A. 10), certiorari denied *sub nom. Bishop* v. *United States*, 397 U.S. 1008; *Loux* v. *United States*, 389 F. 2d 911 (C.A. 9), certiorari denied, 393 U.S. 867; and see *United States* v. *Caruso*, 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862. As the majority below points out (Pet. App. A, p. 7a), Rule 6(d), F. R. Crim. P., states only that "a stenographer or operator of a recording device may be present while the grand jury is in session."

In view of this Court's decision in *Dennis* v. *United States*, 384 U.S. 855, requiring production of grand jury testimony on an adequate showing of need, where to do so will not invade the secrecy of the proceedings, "recordation as a matter of course certainly is the better procedure" (*United States* v. *Ayers*, *supra*, 426 F. 2d at 529, n. 1). In the instant case, however, the failure to follow that procedure plainly was not for the purpose of depriving petitioners of the grand jury testimony of Agent Sager. Rather, a decision was made not to record pursuant to a policy then in effect in the district, calling for transcription of such testimony only "in major criminal cases" (A. 2380a).[2] And, this record makes it abundantly clear that petitioners were not prejudiced

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[2] That policy has since changed and now it is "the policy in the Northern District of New York to record all grand jury proceedings" (Pet. App. A, p. 25a, n. 1).

by that determination. As explained by the majority below (Pet. App. 8a):

> Shortly after each conference between the agent and [petitioners], their attorneys, and their accountant, Agent Sager prepared detailed memoranda, recording what transpired. These made reference to such matters as Louis Cramer's admission that he made the adjustment to purchases without informing Judge Thaler—an item in Sager's trial testimony on which [petitioners] particularly rely in asserting that the unavailability of his grand jury testimony prejudiced them. But, inasmuch as these reports, prepared prior to Sager's grand jury testimony and turned over to the defense pursuant to 18 U.S.C. 3500, were fully consistent with his trial testimony, it would be perverse indeed to predicate a reversal of the conviction on the remote possibility that Sager might have presented the grand jury with a version of the facts different from that reported contemporaneously in his memoranda and later at trial. * * *

2. It is also argued that the trial judge erred in charging the jury that (A. 2105a): "Whenever the fact appears from the evidence beyond a reasonable doubt that a defendant signed a tax return, the Jury may draw an inference and find that such defendant had krowledge of the contents of such return." No objection to this instruction was made at trial,[3] how-

[3] Due to an initial misunderstanding, petitioners' counsel questioned the instruction because he thought that the court had stated that the jury *must* draw the inference (A. 2145a-2146a). When co-counsel pointed out the mistake, the objection was withdrawn (A. 2156a-2157a).

ever, and it cannot now be said that its insertion in the court's charge amounted to plain error under Rule 52(b), F. R. Crim. P.

The questioned instruction does not permit an inference of petitioners' knowledge that the returns were false, but merely states that the jury could infer from the signatures that petitioners knew what facts and figures were set forth in the returns. Unlike *Lurding* v. *United States*, 179 F. 2d 419, 422 (C.A. 6), and *United States* v. *Bass*, 425 F. 2d 161 (C.A. 7), however, on which petitioners place principal reliance, the government was not content in this case to rely on the signatures alone. As the court below indicates, independent evidence showed that the returns were prepared by an accountant from information and figures furnished to him by petitioners. Moreover, the government presented an "impressive case against [petitioners]" (Pet. App. A, p. 20a), demonstrating that the returns were false and that petitioners knew of their falsity (see Pet. App. A, pp. 9a-18a, 20a-21a). Thus, even assuming *arguendo* petitioner's claim that the instruction quoted above was erroneous, the alleged error was in any event harmless in the circumstances of this case. *Kotteakos* v. *United States*, 328 U.S. 750; cf. *Chapman* v. *California*, 386 U.S. 18, 24.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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